

CHAPTER III – ACTIVITIES REGULATED

Chapter Summary

All development activity in the SFHA that may increase flood damages, or that may be prone to flooding itself is subject to the regulations of the NFIP. Any activity that could affect the flow of flood water must be reviewed. Local governments can regulate floodplain development activity within their statutory limits. Some of these activities require permits from other local, state and federal agencies before the floodplain development permit can be issued.

A. Development

In order to accomplish the objective of keeping new construction from making flood problems worse, every activity that could affect the flow of flood water must be reviewed. These activities are defined as "development" in the Model Ordinance and in the NFIP regulations.

Development can be summarized to mean any man-made change to the surface of the earth. It includes buildings, bridges, placement of mobile homes, and fill - obvious potential obstructions to the flow of water. It also includes construction of fences and storage of materials because such activities could catch debris or otherwise dam or divert flood flows.

***Development*, as defined in the Model Ordinance, means any change caused by individuals or entities to improved or unimproved real estate, including but not limited to:**

- 1. the construction of buildings or other structures;**
- 2. the construction of additions or substantial improvements to buildings or other structures;**
- 3. mining, dredging, filling, grading, paving, excavation, drilling operations or storage of equipment or materials; and**
- 4. the storage, deposition, or extraction of materials, public or private sewage disposal systems or water supply facilities.**

It is important to note that the concept of development goes beyond the traditional building permit system most communities have in place. Whereas the building permit is concerned with buildings, the notion of regulating development involves both buildings and alterations to landscape (such as excavation or the use of fill) that might affect flow patterns or the flood carrying capacity of a watercourse. A community's floodplain management program must include the regulation of all improvements or "developments" within the floodplain, not only the construction of buildings and other structures. For permitting purposes, the newly revised Model Floodplain Management Ordinance contained in this handbook now contains a definition for Minor Development.

Theoretically, if a pebble were dropped in a floodplain, it would affect the flow of water. It may border on the ridiculous to require a permit for each solitary pebble placed in a floodplain, but the definition of development in the Model Ordinance does not make exclusions based on size, volume or dollar value of improvements.

B. Statutory Authority to Regulate

The authority for, and restrictions upon a municipality's power to regulate land use in Maine are found in Chapter 187 of Title 30-A. A floodplain management ordinance, such as the one adapted from the Model Ordinance is a zoning ordinance and therefore must be consistent with a municipality's comprehensive plan.

In addition, municipal governments are subject to municipal zoning ordinances, and the State is as well where municipal zoning ordinances are consistent with a comprehensive plan which meets statutory requirements. The State may grant itself a waiver where it can be proved that overriding State concerns require that some zoning

restrictions be waived. The federal government is not subject to municipal zoning ordinances (Title 30-A MRSA § 4352).

C. Other Activities

Over the years, the Federal Insurance Administration has issued policy statements to clarify what must be regulated and what need not be covered in order to meet the minimum requirements of the National Flood Insurance Program. Here are some summaries:

1. To the limits of its statutory authority, a community must regulate all development. This includes development activities undertaken by the local government itself. For example, because the sanitary district, road commissioner or public works department usually does not get a building permit, those agencies frequently do not realize that the floodplain ordinance still applies to their projects and requires a development permit.
2. Only development in the Special Flood Hazard Area is regulated. Projects outside the area are not subject to the ordinance. Frequently, due to the scale of the map and the lack of a base flood elevation (in an unnumbered A Zone) a Code Enforcement Officer may need to make an interpretation of the location of the SFHA boundary. Because a map only shows generally where the SFHA is, the flood elevation must be relied upon to tell if a project is in or out of the SFHA.

This is addressed in Article V, Section B of the Model Ordinance. Any development which takes place within the shaded area on the map must have a permit. If the natural elevation of the building site is higher than the base flood elevation (BFE), the project has met the elevation requirements of the ordinance. If the site is above BFE, the applicant should be advised to seek a Letter of Map Amendment (LOMA) from FEMA. (See page 2-14 for further information on revising or amending flood maps.) Until the map is officially amended, the site will still be subject to the federal law that mandates lenders to require purchase of a flood insurance policy on all structures within the SFHA.

3. NFIP regulations (as well as the Maine Subdivision Law) require that developers supply base flood elevation data for large projects such as subdivisions. This is specified in Article IX, Section D of the Model Ordinance (Article VIII, Section D in the b, c, and d non-coastal models). The Model is slightly more stringent than the NFIP in that it requires base flood data for all subdivisions, while the NFIP requires it only for those projects which exceed 5 acres or 50 lots.

The intent of this requirement is to obtain data which can be used by the community to set an accurate base flood elevation for protecting new buildings. If detailed data is not available in the flood insurance study or from the State Floodplain Management Coordinator, the developer must conduct an engineering study to obtain the data.

4. The NFIP mandates minimum property damage protection standards. It does not mandate environmental protection or public health regulations. For example, a development project would be permitted if it meets the flood damage protection standards of Articles VI and IX (Article VIII in the b, c, and d non-coastal models), even if the project would destroy a bird nesting area or wetland. (Note: other government regulations such as the Army Corps of Engineers' 404 permits or the state's Natural Resources Protection Act may protect such environments.)

Another example: Septic tanks will not operate when they are flooded. However, as long as they will not cause an obstruction to flood flows, they may be permitted. Flooding does not damage them but occupants of the building are faced with a sewage disposal problem. Because of this public health hazard some communities elect to prohibit septic tanks in SFHAs. The *Maine Subsurface Wastewater Disposal Rules* prohibit disposal areas and septic tanks from the 10-year floodplain.

D. Other Regulations

The NFIP requires local governments to be sure that a developer has all other necessary permits before a floodplain development permit is issued (NFIP Regulation 44 CFR 60.3(a)(2) and Model Ordinance, Article V, Section D). The specific permits required will vary according to the type of project.

The major state and federal agencies that may have some jurisdiction over floodplain development activities may include the following:

1. The Maine Department of Environmental Protection (DEP) may have jurisdiction over floodplain developments under any of the following laws or programs:
 - a. The DEP provides water quality certification as required by Section 401 of the Clean Water Act and requires permits for any waste treatment systems which discharge to a water body.
 - b. The Natural Resources Protection Act (Title 38 MRSA § 480-A to 480-V) regulates activities over and adjacent to rivers, streams, great ponds, coastal wetlands, sand dunes, and inland wetlands. Activities which require a permit include: dredging, bulldozing, removing or displacing soil, sand, vegetation, or other materials; draining or otherwise dewatering; filling including adding sand or other material to a sand dune; or construction, repair or alteration of any permanent structure. Generally a permit is required from the DEP for any activity within 100 feet of a protected resource although some activities are covered by a "permit by rule" procedure.
 - c. Site Location of Development Act (Title 38 MRSA § 481 to 490) regulates large development as it related to ground water and the environment. Activities which require a permit include: development that occupies a land or water area in excess of 20 acres; contemplates drilling for or excavating natural resources on land or under water where the area affected is in excess of 60,000 square feet; mining or advanced exploration activity as defined in the law; structures affecting 3 acres; and subdivisions of 5 or more lots affecting 20 acres.
2. Maine Department of Environmental Protection/Department of Conservation/Maine Land Use Regulation Commission have jurisdiction over Metallic Mineral Exploration and Advanced Exploration and Mining (Title 38 MRSA § 349-A).
3. The U.S. Army Corps of Engineers has authority under the
 - a. Rivers and Harbors Act of 1899 (33 U.S.C. §403), sections 9 and 10. Activities under section 9 that need permits include dams or dikes across any navigable (all) waters of the U.S. Section 10 permits are required for the following activities in navigable waters of the U.S.: wharf, dolphin, weir, boom, breakwater, jetty, or groin; bank protection or stabilization activity (e.g. riprap, revetment, or bulkhead); permanent mooring structures such as pilings; aerial or subaqueous power transmission lines; intake or outfall pipes; permanently moored floating vessels; tunnels, artificial canal; boat ramps; aids to navigation; a permanent or semi-permanent obstacle or obstruction; dredging or disposal of dredged material, excavation, and filling, or other modification affecting the course, location, condition, or capacity of navigable waters of the United States.
 - b. Clean Water Act (33 U.S.C. §1344), section 404. This section regulates the discharge of dredged or fill material into all waters of the United States. Activities needing permits include placement of fill that is necessary to the construction of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, and other uses; causeways or rad fills, dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.
4. U.S. Coast Guard. Activities that need permits include bridges and causeways.

The Code Enforcement Officer should be familiar with the permitting requirements of other agencies and advise permit applicants accordingly.

In administration of the floodplain management ordinance, the CEO must keep in mind that shoreland zoning and any town-wide zoning still apply. Most water bodies for which a special flood hazard area has been designated will be large enough to be included within a community's Shoreland Zoning Ordinance.